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Honorable Judge Samuel J. Steiner
DATE: November 12th, 2010
TIME: 9:30 a.m.
Chapter 11
LOCATION: Seattle
RESPONSE DUE: Wednesday, Nov. 10, 2010

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In re: Adam R. Grossman, Debtor.	CHAPTER 11 BANKRUPTCY CASE NO. 10-19817-SJS MEMORANDUM OF POINTS AND AUTHORITY IN SUPPORT OF DEBTOR'S APPLICATION FOR AUTHORITY TO EMPLOY FAMILY LAW ATTORNEY AS DEBTOR'S SPECIAL COUNSEL NUNC PRO TUNC

The Debtor-in-Possession submits this Memorandum of Points and Authorities in Support of its Application for Authority to Employ Family Law Attorney as Debtor's Special Counsel Nunc Pro Tunc.

In the case of In re Goldstein, 383 B.R. 496, Bankr. L. Rep. P 80, 987 (Bkrtcy.C.D.Cal., 2007), the Court held that:

“In In re Colin, 27 B.R. 87, 89 (Bankr.S.D.N.Y. 1983), a chapter 11 debtor was permitted to retain special counsel for marital dissolution so long as the services concerned the dissolution of marriage as well as the disposition of estate property. Id. However, only professional services relating to the disposition of estate property were reimbursable from the bankruptcy estate. In contrast, services relating to the marital dissolution could not be reimbursed from the estate. Id. The Colin court required special divorce counsel to prepare professional fee applications in detail so that the court could distinguish between legal services relating to the disposition of estate property and representation concerning the marriage dissolution. Id.

BAPCPA made a fundamental change in how post-petition divorce actions (and many other expenses in an individual's chapter 11 case) can be funded. Section 1115(a), which BAPCPA added to the bankruptcy code, provides in relevant part:

[i]n a case in which the debtor is an individual, property of the estate, in addition to the property specified in section 541-

(1) all property of the kind specified in section 541 that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first; and

> FN4 Section 541 broadly defines property of the estate to include “all legal and equitable interests” of the debtor in property at the date of the filing of the bankruptcy petition (with certain exceptions not relevant here).

(2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first.

Thus § 1115(a) gives rise to a new issue that individual chapter 11 debtors have never faced before, because it deprives most individual debtors of any non-estate assets that can be used for any purpose. Essentially all property that an individual debtor obtains while the chapter 11 case is pending is now property of the bankruptcy estate (unless the debtor has the good fortune of having non-estate property, which is unlikely in most cases). Now, individual chapter 11 debtors are no longer permitted to use their post-petition income to pay divorce counsel unless such an expense is authorized for property of the bankruptcy estate.”

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Clearly, however, by enacting the BAPCPA, Congress did not intend to prohibit chapter 11 debtors from getting divorced. "Preventing a debtor from retaining counsel to get a divorce is not one of the purposes of the bankruptcy code." In re Goldstein, 383 B.R. 496, Bankr. L. Rep. P 80, 987 (Bkrtcy.C.D.Cal., 2007).

Therefore, under the BAPCPA, the only remaining way under the current version of Section 1115(a) is for a third party (or parties) to pay for those portions of a chapter 11 Debtor's divorce proceeding that are non-estate related.

When third parties pay portions of a chapter 11 Debtor's legal fee and when further, such payments are made with no strings attached (as they are in the case before this court; see Debtor's Application to Employ, page 3, line 2, filed herewith), as long as such payments are disclosed to the Court in Applications for Employment and, subsequently, in Motions for Payment of Fees, there should be no finding that Debtor's divorce attorney had a disqualifying interest or conflict. In re American Intern. Refinery, Inc., 436 B.R. 364, (Bkrtcy.W.D.La., 2010).

The American Intern. Refirery court went on to distinguish that case, where the payments from a third party for Debtor's chapter 11 legal retainer were given with no strings attached, from In re Marine Power & Equipment Co., Inc., 67 B.R. 643 (Bankr.W.D.Wash. 1986) where the Washington court found both actual and apparent conflict but where Debtor's counsel performed dual representation of both debtor corporation and its officers (the third party payors of that Debtor's fees) as co-defendants in connection with a criminal proceeding.

No such facts giving rise to either actual or even apparent conflict exist in the case before this court.

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Respectfully submitted this 4th day of November, 2010.

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By: /s/ Matthew D. O'Conner________
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